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No. 80-2221

IN THE

Supreme Court of the United States

October Term, 1980

INDUSTRIAL CONSULTANTS, INC.,
Petitioner,

v.

H. S. EQUITIES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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July 28, 1981

Counter-Statement of Question Presented

Were the courts below correct in holding that petitioner's claims, concededly time-barred under the applicable Oklahoma statute of limitations, were not revived by an Oklahoma tolling provision declared unconstitutional as violative of both the Due Process Clause of the Oklahoma Constitution and the Equal Protection Clause of the federal Constitution?

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is officially reported at 646 F.2d 746. The opinion of the United States District Court for the Southern District of New York, Griesa, J., is not officially reported.

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INDUSTRIAL CONSULTANTS, INC.,

Petitioner,

-against-

H.S. EQUITIES, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Preliminary Statement

Respondent H.S. Equities, Inc. submits this Brief in opposition to the petition of Industrial Consultants, Inc.

for a writ of certiorari.* Petitioner seeks review of the judgment and opinion of the Court of Appeals for the Second Circuit (A. 1a-16a)** affirming the order and opinion of the United States District Court for the Southern District of New York (Thomas P. Griesa, J.) (A. 17a-29a), which granted respondent's motion for summary judgment dismissing the complaint on the ground that petitioner's claims under various provisions of the federal securities laws*** and

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* Respondent has no parent company, subsidiaries or affiliates. Rule 28.1 of the Rules of the Supreme Court of the United States.

** References to "(A.__)" are to pages of the Appendix to the petition for a writ of certiorari.

*** The complaint alleged claims against respondent pursuant to §17(a) of the Securities Act of 1933 (15 U.S.C. §77q(a)), §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)) and Rule 10b-5 thereunder (17 C.F.R. §240.10b-5).

common law were time-barred.

The writ should be denied because petitioner's complaint was dismissed in accordance with settled principles of Oklahoma and federal law and petitioner has failed to demonstrate that any of the considerations governing review on certiorari are present here.

The District Court's Opinion

Applying established Second Circuit and New York law, the district court held that in securities fraud litigation a cause of action accrues for purposes of New York's borrowing statute (N.Y. CIV. PRAC. LAW §202 (McKinney 1972)), in the state where the loss resulting from the alleged misrepresentation occurred (A. 26a). Finding that state to be Oklahoma -- rather than New York, as petitioner had argued -- the district court applied Oklahoma's two-

year statute of limitations (A. 28a). Since the alleged fraud was discovered in 1970 and this action was not brought until 1976, the district court held petitioner's claims time-barred. The court rejected petitioner's contention that the running of the statute of limitations had been tolled by virtue of Okla. Stat. Ann. tit. 12, §98 (West). Although that provision tolled the running of the statute against a person who was outside the state until he came into the state, even when such person was amenable to service outside the state, it had been declared unconstitutional by the Oklahoma courts, Wright v. Keiser, 568 P.2d 1262 (Okla. 1977).

The Court of Appeals' Opinion

The court of appeals affirmed the district court's dismissal of the complaint as time-barred. First, it

held that the district court was bound by the holding of the Oklahoma Supreme Court in Wright v. Keiser that the Oklahoma tolling provision violated the Due Process Clause of the Oklahoma Constitution (OKLA. CONST. art. 2, §7) (A. 13a), a ruling whose correctness petitioner does not dispute. In connection with that state-law basis for decision, said the court of appeals, it is necessary to consider whether the Oklahoma Supreme Court intended its holding in Wright to be retroactive. Since under Oklahoma law, when a statute is ruled unconstitutional it is void ab initio (State v. Board of County Com'rs of Creek County, 107 P.2d 542, 546-47 (Okla. 1940)), if the Oklahoma Supreme Court were asked to determine whether its holding in Wright was retroactive, "the probabilities are", in the words of

the court of appeals (A. 14a), that it would hold that it was. This could have ended the inquiry: The unconstitutionality of the tolling provision under Oklahoma law, retroactively applied in accordance with Oklahoma law, mandated dismissal of the complaint.

The Second Circuit, however, went on to rule that the tolling provision also violated the federal Equal Protection Clause. U.S. CONST. amend. XIV, §1. Consequently, the tolling provision could not be given effect by a federal court (Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 547 (1949)) and it does not matter when Wright was decided (A. 14a).

Reasons for Denying the Writ

A. The Tolling Provision Concededly Violated the Due Process Clause of the Oklahoma Constitution And Was Void Ab Initio Under Oklahoma Law

The tolling provision in question was declared unconstitutional by the Oklahoma Supreme Court as violative of the Due Process Clause of the Oklahoma Constitution, Wright v. Keiser, 568 P.2d 1262, 1267 (Okla. 1977), a ruling conclusive upon this Court. Huddleston v. Dwyer, 322 U.S. 232, 237 (1944). While not disputing this holding, petitioner contends that the lower courts improperly applied Oklahoma law; that, as a matter of Oklahoma law, this declaration of unconstitutionality does not apply to petitioner since it occurred subsequent to the commencement of this action. Petitioner is wrong.

Under Oklahoma law, when a statute is ruled unconstitutional, it is

void ab initio. State v. Board of County Com'rs of Creek County, 107 P.2d 542, 546-47 (Okla. 1940); and see Town of Medford v. Early, 153 P.2d 633, 635 (Okla. 1944). Petitioner concedes that the Creek County void ab initio rule is applicable unless it can bring itself within an exception to the rule (Petition, pp. 20-21). It cannot.

In Creek County the Supreme Court of Oklahoma recognized only two exceptions to the void ab initio rule; one for judgments rendered under a statute subsequently declared unconstitutional, and the other excepting the acts of public officials under a law subsequently declared unconstitutional.

Petitioner does not claim either of these exceptions but contends that there are additional exceptions to

the void ab initio rule. It claims an "exception" to the Creek County rule exists for anyone who relies upon a law later held to be unconstitutional.* Oklahoma law provides no general exception to the void ab initio rule for those who "rely" upon an unconstitutional statute. Indeed, in holding a statute unconstitutional in Creek County, the Supreme Court of Oklahoma rejected just such an argument.

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* Petitioner never claimed below that it actually relied upon the unconstitutional tolling provision in waiting to bring suit until two days before the expiration of New York's six-year limitations period -- an unusual delay in view of the availability to petitioner from the time its claim accrued of nationwide service of process under the federal securities laws. §22(a) of the Securities Act of 1933 (15 U.S.C. §77v(a)) and §27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa).

Petitioner's attempt to create this additional "exception" is based upon a misreading of three cases which preceded Creek County. All of these cases involved applications of the second Creek County exception and upheld the acts of administrative officers performed in good faith upon the basis of statutes subsequently ruled unconstitutional.*

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* Board of Com'rs of Pottawatomie County v. A. C. Davis & Sons, 86 P.2d 782 (Okla. 1939); Gordon v. Conner, 80 P.2d 322 (Okla. 1938); and Wade v. Board of Com'rs of Harmon County, 17 P.2d 690 (Okla. 1932) (Petition, pp. 21-22). Gordon and Wade were both actions against administrative officers to penalize them for acts performed in reliance upon laws later declared unconstitutional. Indeed, these cases were cited by the defendants in Creek County, who made the reliance argument now made by petitioner. In Creek County,

(footnote continued)

(footnote continued)

the court rejected the general reliance argument because the exception is a narrow one covering reliance by administrative officials only. The A. C. Davis case also involved the conduct of administrative officers acting in reliance upon a law later declared unconstitutional. In A. C. Davis the plaintiff was an architectural firm seeking to recover fees under a contract it made with the County Board, and it was the Board which sought to disavow the agreement on the grounds the statute pursuant to which it had acted in appropriating funding for the project was invalid. Applying the same exception to the void ab initio rule represented by Gordon and Wade and reaffirmed one year later in Creek County, the court ruled that even assuming the statute was unconstitutional, the Board was entitled to rely upon it in contracting for the architects' services and in appropriating funds to pay for them. As a by-product, plaintiff was permitted to recover. (In quoting from the A.C. Davis case, petitioner has taken liberties. The A.C. Davis court did not say the "parties" were entitled to rely on the arguably unconstitutional statute, but rather "the Board of

(footnote continued)

Petitioner also seeks to avoid the rule of Creek County by claiming that under Oklahoma law an accrued cause of action is a constitutionally protected right and that any "change" in a statute of limitations -- whether by statutory or "constitutional interpretation" or legislative amendment -- results automatically in the creation of a grace period within which an accrued cause of action may be brought (Petition, p. 18). Petitioner's cases do not support this proposition. Whether a "change" in a statute of limitations occurs by virtue

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(footnote continued)

> County Commissioners was entitled to rely" on the statute. 80 P.2d at 783.) The reasoning underlying the decision in Davis is precisely the same as in Gordon and Wade and the three cases all come within the second exception to the void ab initio rule of Creek County.

of a judicial ruling of unconstitutionality or simply as a result of a new judicial interpretation or legislative amendment is hardly, as petitioner appears to contend, irrelevant; in view of the void ab initio rule it is critical. State v. Board of County Com'rs of Creek County, supra, 107 P.2d 542. The remaining cases cited by petitioner (Petition, pp. 24-27) are beside the point, involving new judicial interpretations of statutes or legislative amendments; not one case offered by petitioner deals with a judicial ruling of unconstitutionality.

Under Oklahoma's void ab initio rule, the holding of Wright v. Keiser, declaring the tolling provision upon which petitioner relies violative of the Due Process Clause of Oklahoma's Constitution, mandated dismissal of its

claims as time-barred. This constitutes an adequate and independent nonfederal ground for the decision (cf. Fox Film Corporation v. Muller, 296 U.S. 207, 210 (1935); Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Murdock v. Mayor of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875)), and the writ should therefore be denied without even reaching the federal ground for the decision.

B. Since the Oklahoma Tolling Provision Violated the Equal Protection Clause, It Could Not Be Given Effect By a Federal Court And The Issue of Retroactivity Is Not Reached

The court of appeals held the Oklahoma tolling provision unconstitutional for the additional reason that it violated the federal Equal Protection Clause (A. 14a-16a). Petitioner does

not challenge this holding.* Rather,

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* The Equal Protection Clause denies to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Company v. Virginia, 253 U.S. 412, 415 (1920); Reed v. Reed, 404 U.S. 71, 75-76 (1971). The purpose of a tolling provision is to preserve a plaintiff's cause of action where the defendant is not amenable to process. Since absent and non-resident defendants were and are as amenable to process under Oklahoma law as resident defendants, the classification worked by the tolling provision bore no relation to the statutory purpose. No legitimate interest of Oklahoma was furthered by denying non-residents and those absent from the state the defense of the bar of the statute of limitations, while permitting residents to plead it. Wright v. Keiser, 568 P.2d 1262, 1265-66 (Okla. 1977).

it claims that since the Supreme Court of Oklahoma also declared the statute unconstitutional on this ground in Wright v. Keiser, 568 P.2d 1262, 1267 (Okla. 1977), and the Wright ruling came after this action was commenced, it cannot serve as a basis for barring petitioner's claims. To that end, petitioner devotes ten pages of its petition to an analysis of this Court's decision in Chevron Oil Company v. Huson, 404 U.S. 97 (1971), and the considerations governing retroactive application of judicial decisions. However, petitioner overlooks a crucial point of the court of appeals' opinion: The district court was not bound to follow Wright when it came to interpreting federal constitutional principles -- it was free to declare the Oklahoma tolling provision unconstitu-

tional as a denial of equal protection under the federal Constitution, regardless of how that issue had been decided by the Oklahoma Supreme Court in Wright (see A. 14a-15a). Indeed, under Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 547 (1949), even if the Wright court had determined that the tolling provision did not violate the Equal Protection Clause, the district court here could not have enforced the statute if in its judgment it violated the federal Constitution.

Of course, the Wright court did rule that the tolling provision violated the federal Equal Protection Clause and, in refusing to give effect to the tolling provision the district court cited Wright, a ruling which, as the court of appeals emphasized,

> was particularly persuasive in the instant case, because it depended in large part upon the Oklahoma Supreme Court's intimate knowledge of the operation of Oklahoma's long-arm statutes.

(A. 15a.) However, because it is the decision of the lower courts in this litigation -- not that of the Oklahoma court in Wright -- that establishes the constitutional infirmity, it makes no difference when Wright was decided (A. 14a). The retroactivity issue which petitioner briefs at great length is, thus, beside the point. Respondent cannot be denied equal protection of the laws simply because the Wright court declared the unconstitutionality of the tolling provision on equal protection grounds before the issue reached the district court here.

Conclusion

For the reasons stated above, the decisions below are consistent with the applicable decisions of the Oklahoma Supreme Court and of this Court. The petition is without merit and should be denied.

Respectfully submitted,

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